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No. 722

# In The Supreme Court of The United States

October Term, 1962

WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 542,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, et al.,

Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## SUBJECT INDEX


I QUESTION PRESENTED BY THE PETITION . . . . . .

H STATEMENT OF THE CASE . . . . . .

III ARGUMENT . . . . . .

A. THERE IS NO JURISDICTION TO GRANT THE WRIT SOUGHT . . . . .

B. IF JURISDICTION TO GRANT THE PETITION EXISTS, IT SHOULD BE DENIED AS A MATTER OF DISCRETION . . . . . .

C. PETITIONER HAS NOT PROPERLY PRESERVED THE FEDERAL QUESTION IT NOW RAISES . . . . . .

D. THE PETITION IS WITHOUT MERIT UNDER THE LAW . . . . . .

IV CONCLUSIONS . . . . . .

## TABLE OF AUTHORITIES CITED


Page

CASES

Alfred M. Lewis, Inc. v. Warehousemens Local 542, 163 Cal. App. 2d 771, 330 P. 2d 53 (1958) . . . . . 2, 9, 10

Allen-Bradley Co. v. Local Union No. 3 IBEW, 325 U.S. 797 (1945) . . . . . 7, 12, 13

Alpha Beta Food Markets, Inc. v. Amalgamated Meat Cutters, 147 Cal. App. 2d 343, 305 P. 2d 163 (1956) . . . . . 14

Association of Orchestra Leaders v. Musicians Local 77, 203 F. Supp. 755 (E.D. Pa. 1962) 15

Building Contractors Assn. v. Gugliemelli, 22 CCH Lab. Cas., Par. 67065 (N.Y. Supreme Court, N.Y. County Special Term, Part III, 1952) . . . . . 14

Commonwealth v. McHugh, 326 Mass. 249, 93 N.E. 2d 751 (1950) . . . . . 14, 16

Cuyahoga Plastering Contractors Assn. v. Lennox Halderman Co., 39 CCH Lab. Cas., Par 66265 (N.D. Ohio 1960) . . . . . 15

## TABLE OF AUTHORITIES CITED (Cont'd.)

Page

### CASES


De Lao v. Superior Court, 37 Cal. 2d 711, 234 P. 2d 961 (1951) . . . . . 6

East Texas Motor Freight Lines v. Teamsters Union, 163 Fed. 2d 10, (5th Cir. 1947) . . . . . 13

Electrical Workers v. U.S., 219 Fed. 2d 431 (6th Cir. 1955) cert. denied, 349 U.S. 917 (1955) . . . 13

Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949) . . . . . 7, 14

Gore v. Bingaman, 20 Cal. 2d 118, 124 P. 2d 17 (1942) . . . . . 8

Heavy High Bldg. Constr. Teamsters v. Superior Court, 203 Adv. Cal. App. 665, 21 Cal. Rptr. 840 (1962) . . 11

Herndon v. Georgia, 295 U.S. 441 (1935) . . 9

Illinois Central R.R. v. State P.U.C. of Ill., 245 U.S. 493, 510 (1918) . . . . 17

Ivory v. Superior Court, 12 Cal. 2d 455, 85 P. 2d 894 (1938) . . 6

Jewell Tea Co. v. Meat Cutters, 274 F. 2d 217 (7th Cir. 1960) . . . . . 14

## TABLE OF AUTHORITIES CITED (Cont'd.)


Page

CASES

Kold Kist v. Amalgamated Meat Cutters, 99 Cal. App. 2d 191, 221 P. 2d 724 (1950) . . . . . 14

Lewis v. Pennington, 38 CCH Lab. Cas., Par. 65747 (E.D. Tenn. 1959) . . . . . 15

Local No. 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959) . . . . . 9, 10, 11 12, 14, 15

Los Angeles Meat Drivers Local 626 v. U.S., 368 U.S. 965 (1962) . . . . . 15

Messner v. Journeymens Barbers etc. International Union, 58 Cal. 2d 873, 351 P. 2d 347 . . . . . 9

N.Y. Central Ry. v. N.Y. Penn Co., 271 U.S. 124 (1926) . . . . . 9

Parker v. Illinois, 333 U.S. 571 (1948) . . . 5

Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P. 2d 783 (1945) . . . . . 8

Radio Officers v. N.L.R.B., 347 U.S. 17 (1954) . . . . . 12

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CASES

Red Owl Stores v. Amalgamated Meat Cutters, 109 F. Supp 629 (D. Minn. 1953) . . . . . 14

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) . . . . . 5

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) . . . . . 6

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) . . . . . 6

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) . . . . 9

Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958) . . . 15

U.S. v. Employing Plasterers Association, 347 U.S. 186 (1954) . . . 13

United States v. Hutcheson, 312 U.S. 219, 232 (1941) . . . . . 13

United States v. Womens Sportswear Manufacturers Association, 336 U.S. 460, 464 (1949) . . . . . 13

Weber v. Anheuser-Busch, 348 U.S. 468 (1954) . . . . . 13

## TABLE OF AUTHORITIES CITED (Cont'd.)


Page

### CODES

Calif. Code of Civ. Proc. Sec. 1067 . . . . . 6
Sec. 1068 . . . . . 6
Sec. 1102 . . . . . 6
Sec. 1103 . . . . . 6

### STATUTES

28 U.S.C. Sec. 1257 . . . . . 5

29 U.S.C. Sec. 158(b)(2)
National Labor Relations Act,
Section 8(b)(2) . . . . . 10

29 U.S.C. Sec. 160(b)
National Labor Relations Act 310(b) . . . 12

### OTHER AUTHORITIES

Hearing Before the Senate Committee
on the Judiciary, 87th Cong.,
1st Sess. 18 (1961) . . . . . 16

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, et al.,

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I.

## QUESTION PRESENTED BY THE PETITION

The Real Party in Interest, ALFRED M. LEWIS, INC., hereinafter referred to as LEWIS for clarity, contends Petitioner has misstated the questions presented. Only one question is present if this Honorable Court feels the petition should be allowed. The question is:

> "Does a State Court have jurisdiction to grant damages to a party injured by a tortious conspiracy of employer and labor groups which has destroyed said party's business in violation of the State's Anti Trust Statutes?"

## II.

## STATEMENT OF THE CASE

Petitioner's statement of the case is misleading and alleges the existence of facts totally unsupported by any evidence or even pleadings at any state of the lengthy litigation of this matter. The statement of facts in the decision of the California District Court of Appeal, at 163 Cal. App. 2d 771; 330 P. 2d 53 (1958) when compared to petitioner's allegations makes this clear.

In May, 1956, LEWIS established a wholesale produce business in San Diego. It was LEWIS' first and only produce operation. It was totally divorced from LEWIS' wholesale business in dry groceries, both as to location and personnel. Rideout possessed modern

loading and storage facilities long before LEWIS entered the picture and this was never raised as a factor by petitioner until LEWIS started its business.

Two separate trial courts have found that neither LEWIS or Rideout had "captive accounts", or "semi-captive accounts" or were in any other way comparable to the Safeway Stores' operation. On the contrary, the trial courts have found that the "semi-captive account" argument was a false front asserted by petitioner and the conspiring employers to try to mask their nefarious agreement.

Contrary to petitioner's claim of divorcing a segment of its membership working for LEWIS and Rideout from the segment working for other produce dealers, there was no such division until LEWIS entered upon the scene, although Rideout for many months had enjoyed the alleged advantages over his competitors which purportedly required a change in his status in May, 1956.

At the second trial further evidence added to the proof of the conspiracy and its total lack of any legitimate labor objective. From May of 1956 through the end of the strike in 1957, a number of contacts between officers of petitioner and the head of the defendant employers group were disclosed by the diary of the individual head of the employers group. The diary indicated the employers group was kept advised by petitioner's officers of union meetings, the meeting place, time and the results of votes taken on striking LEWIS and Rideout. These communications of petitioner to the conspiring employers related to petitioner's demands and actions toward LEWIS' and Rideout's alleged "segment" of ptitioner's employees and not the "divorced segment"

working for the defendant employers.

Additional evidence also disclosed that at the end of the strike around April 25, 1957, LEWIS had totally closed down his produce business and withdrawn from the scene. When this happened, petitioner, through its officers and attorney, told Rideout he could return to work at the lower wage rate granted the defendant employers, provided he agreed to: (1) Dismiss his damage and injunction suit against petitioner and defendant employers; and (2) agreed not to associate in any form or manner with LEWIS and not to let LEWIS use his facilities for a produce business by way of lease, joint venture or any other scheme. Petitioner also offered Rideout a contract on the same wage basis as defendant employers with the additional written provision that if Rideout ever associated in any way with any firm engaged in the produce business which was also engaged in any manner in the grocery business, then Rideout's wages would be at the higher rate of Safeway Stores. The only entity which would fit the contractual category which could impose on Rideout the discriminatory wage rate was Lewis.

After accepting petitioner's demands, Rideout went back into business but could not recover from the financial loss suffered in the strike. Finally some months later Rideout sold his business to a group of retail grocers who formed a new venture. Although Rideout's business was now owned by retail grocers selling produce to their retail outlets, i.e., "captive accounts", none of the events which met LEWIS' entry into the produce business recurred.

## III.

## ARGUMENT

### A. THERE IS NO JURISDICTION TO GRANT THE WRIT SOUGHT

Jurisdiction to grant the writ sought depends upon the finality of the decision below within the meaning of 28 U.S.C. Sec. 1257.

Petitioner seeks to review a decision of a trial court of general jurisdiction finding petitioner liable for violation of State anti-trust acts before the lower court decides if any damages have been suffered by Lewis, before it makes findings of fact, before it has purported to decide any of the issues posed by the second and third questions in the petition, and before it has made any final decision or judgment.

The claim by petitioner that review should not await the normal procedure of judgment and the appellate system of the state courts is unsound from a practical viewpoint and contrary to law.

Petitioner's theory that the test of finality is met because liability has been decided and all that remains is to award damages is unsound, Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948). A judgment of a state appellate court is not final unless it ends the litigation by fully determining the rights of the parties, leaving to the trial court only the ministerial function of entering the directed judgment (Parker v. Illinois, 333 U.S. 571 (1948) ).

Petitioner's argument of finality rests on an assertion that the denial of its petitions for writs of

certiorari or prohibition in the state appellate courts are final under the doctrine of Rescue Army v. Municipal Court, 331 U.S. 549 (1947). That case requires that the denial of the petition by the state courts involved a determination of a federal question and that it does not rest on an adequate state ground alone. Since the denial of petitioner's requested relief by the District Court of Appeal and Supreme Court of California were without opinion, there is no basis for saying that the denial involved a decision on a federal question.

It is proper to examine California law to determine if its decision was final in the appellate courts, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946).

California allows a writ of review where an inferior judicial tribunal has exceeded its jurisdiction and there is no appeal, or, in the judgment of the court, there is no plain, speedy, and adequate remedy, Calif. Code of Civ. Proc. Sec. 1068. A writ of review may be denominated a writ of certiorari, Calif. Code of Civ. Proc. Sec. 1067. A writ of prohibition will issue for the same purpose and on the same conditions, Calif. Code of Civ. Proc. Secs. 1102, 1103.

Where the ruling sought to be reviewed is not appealable, certiorari will not lie if petitioner has an adequate remedy by appeal from a subsequent judgment or order, DeLao v. Superior Court, 37 Cal. 2d 711, 234 P. 2d 961 (1951); Ivory v. Superior Court, 12 Cal. 2d 455, 85 P. 2d 894 (1938). Since appeal from a subsequent judgment of the trial court is available in this case and the trial court's memorandum decision is non-appealable, the state appellate courts could clearly

have denied petitioner the relief sought on state law alone without regard to deciding any federal question.

B. IF JURISDICTION TO GRANT THE PETITION EXISTS, IT SHOULD BE DENIED AS A MATTER OF DISCRETION.

Considerations for granting certiorari are not present even if jurisdiction to grant the writ is present. The state courts of California have not decided a substantial federal question not determined by the United States Supreme Court, nor have they made a decision not in accord with decisions of the United States Supreme Court.

Assuming the decision of the state court sought to be reviewed decides a federal question, it of necessity would be in accord with Allen-Bradley Co. v. Local Union No. 3 IBEW, 325 U.S. 797 (1945) and Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949). The state court decision at most could hold that a union is not immune from anti-trust laws where it combines with non-labor groups for a purpose lacking a legitimate labor objective.

To grant certiorari is to conclude at this time that the trial court and appellate court of the state would, in the future, allow a final judgment contrary to the laws of California and the United States.

Petitioner's argument that denial of review at this state will hamper petitioner's legitimate activities pending final determination is absurd. The assertion is pure speculation unsupported by evidence at any time. Petitioner's own actions deny the claim. Petitioner

chose to abandon review of the decision of the District Court of Appeal in 1957. Petitioner preferred to retry the issue of liability a second time to see which way the wind was blowing before seeking any writ on jurisdictional grounds. After seeking a writ, petitioner has availed itself at each stage of the appellate procedure, including its petition to this Court, of the maximum time allowed including extensions where available. Such conduct belies the claim that this litigation interferes with petitioner's legal objectives.

C. PETITIONER HAS NOT PROPERLY PRESERVED THE FEDERAL QUESTION IT NOW RAISES.

Under the law of California, the doctrine of "law of the case" applies to any question as to the sufficiency of the evidence to support the second trial court's finding of a conspiracy by petitioner with employers to destroy LEWIS, Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P. 2d 783 (1945). The only question not foreclosed by "law of the case" is the issue of jurisdiction.

If petitioner considered the ruling by the state appellate court on the appeal after the first trial court decision erroneous on the issue of jurisdiction, petitioner could have and should have applied to the California Supreme Court for a hearing, Gore v. Bingaman, 20 Cal. 2d 118, 124 P. 2d 17 (1942). If a hearing was denied, or if granted and unfavorable to petitioner, petitioner could have applied to this Court years ago for certiorari. However, petitioner preferred to let an appellate decision become final and retry the case.

The burden was and is on petitioner to preserve a

federal question as the settled rules of state practice required, Herndon v. Georgia, 295 U.S. 441 (1935); N.Y. Central Ry. v. N.Y. Penn. Co., 271 U.S. 124 (1926).

Petitioner, having failed to preserve the federal question of preemption by availing itself of its remedies in higher courts after the first appeal, should not now be heard to plead for a writ on that issue in the middle of a second trial before judgment.

D. THE PETITION IS WITHOUT MERIT UNDER THE LAW.

The contention of petitioner is built solely around the claim that the decision of the United States Supreme Court in San Diego Building Trades Council vs. Garmon, 359 U.S. 236 (1959) which was decided after the appeal above mentioned in this particular case, has changed the law as to jurisdiction of a state over the type of activity involved. Petitioner cites no cases of the federal courts or of any state courts which overrule, reverse, or criticize the decision in Alfred M. Lewis, Inc. vs. Warehousemens, Local 542, 163 Cal. App. 2d 771, 330 P. 2d 53 (1958), nor do they contend there are any cases which impliedly criticize the decision.

Since the decision of the Garmon II case, relied upon by petitioners, the decision in Alfred M. Lewis, Inc. v. Warehousemen, Local No. 542, supra, has been cited by the California Supreme Court in Messner v. Journeymens Barbers etc. International Union, 53 Cal. 2d 873, at page 886, 351 P. 2d 347, at page 356 (1960). It should be noted that the Messner decision particularly made reference to Local No. 24, International Brotherhood of Teamsters vs. Oliver, 358 U.S. 283 (1959),

which is a decision relied upon by petitioner in its claim that there is no jurisdiction in the State Court to entertain plaintiff's action.

The decision in San Diego Building Trades Council vs. Garmon, supra, involved a matter in which the court had specifically found the conduct of the Union was an unfair practice under Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. Sec. 158(b)(2), and the state court had held the Union's conduct constituted a tortious activity based on an unfair labor practice under the laws of the State of California. The Garmon case involved a pure question of Labor Law involving a Union and had nothing to do with anti-trust acts or their application to a conspiracy between a Union and employers to stifle competition.

The petitioner relies on Local No. 24 of the International Brotherhood of Teamsters etc. vs. Oliver, 358 U.S. 283 (1959). Its reliance on this case is unjustified. The court in that case pointed out the facts involved wage and not price fixing. It was specifically stated in that decision at page 286;

> "No claim is made that Article XXXII (the Article of the contract which the state court contended violated its anti-trust laws) violates any provision of Federal Law."

It is further stated in the Oliver decision, at Page 296:

> "Federal Law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. Allen-Bradley Co. v. Local Union No. 3, IBW,

325 U.S. 797."

Heavy High Bldg. Constr. Teamsters vs. Superior Court, 203 Adv. Cal. App. 665, 21 Cal. Rptr. 840 (1962) is identical to the Oliver case and recognizes the same limitations on Union conduct in combining with employer groups.

Petitioner's position is merely that because petitioner is a union, its conduct must, as a matter of law, be "arguably" within the jurisdiction of the National Labor Relations Board, because it is so "argued" by petitioner. This ignores the finding by two trial courts that petitioner was engaged in price fixing and not wage fixing. It further ignores the finding that petitioner's acts were totally lacking in any legitimate labor purpose. It even ignores that its acts were in concert with non-labor groups who do not seek relief in this Court.

The fallacy of petitioner's position is that it denies the right of a trial court to ever decide if a Union's conduct is not "arguably" within the jurisdiction of the National Labor Relations Board. It denies the right of a trial court to decide that a Union's conduct lacks a legitimate labor objective. It claims this function is denied a trial court because a Union merely pleads its status and claims its conduct is "arguably" within the jurisdiction of the National Labor Relations Board.

Petitioner further ignores the fact that when the amended complaint was filed before the second trial LEWIS was out of business. Thus LEWIS, vis-a-vis petitioner, had no relationship at all, except a tort claim for damages inflicted years before. Petitioner also ignores the fact that no relief was open to LEWIS

in the National Labor Relations Board under any theory since the Board's jurisdiction over any conduct of petitioner in 1956 or 1957 was barred by the Board's six months limitation on filing unfair practice charges, N. L. R. A. 310(b), 29 U.S.C. Sec. 160(b); Radio Officers v. N. L. R. B. 347 U.S. 17 (1954).

As previously determined in the LEWIS appeal, the conduct complained of here is a violation of the United States Anti-Trust Laws, as well as the State Anti-Trust Act. Yet in the Oliver case the Court was careful to point out that the provisions of a contract attacked by the State of Ohio as a violation of its Anti-Trust Act did not violate any provisions of the Federal Anti-Trust Law. Further, the Court's recognition that Federal Law sets an outside limit on the type of conduct of the Union, as set forth in the Allen-Bradley case, cited in the opinion, is a clear recognition that the type of conduct complained of by LEWIS continues to be outside the application of the Federal Labor Act for purposes of preemption.

Starting with the Allen-Bradley case, a long line of decisions have held that a Union can seek no shelter of immunity under the Federal Labor Acts where it is guilty of combining with employer groups to violate Anti-Trust acts. This Court stated in Allen-Bradley Co. v. Local Union No. 3 IBW, 325 U.S. 797, 808 (1945):

> "Without regard to these cases, however, we think Congress never intended that Unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control

the marketing of goods and services."

There is not the slightest implication in any decision of this Court since the Allen-Bradley case to indicate that the Court has ever intended to confer immunity on Unions conspiring with employers to stifle competition in violation of Anti-Trust Acts. Previous to the Allen-Bradley case, this Court has indicated in United States v. Hutcheson, 312 U.S. 219, 232 (1941) as follows:

> "There was no violation of anti-trust laws so long as a 'Union acts in its self-interest and does not combine with non-labor groups'."

The decision of this Court in the Bradley case has been consistently followed in the Federal Courts. U.S. v. Employing Plasterers Association, 347 U.S. 186 (1954); Electrical Workers v. U.S., 219 Fed. 2d 431 (6th Cir. 1955) cert. denied, 349 U.S. 917 (1955); East Texas Motor Freight Lines v. Teamsters Union, 163 Fed. 2d 10 (5th Cir. 1947).

In United States v. Womens Sportswear Manufacturers Association, 336 U.S. 460, 464 (1949), this Court gave a full answer to the claim of petitioner herein as follows:

> "Benefits to Unions cannot be used 'as a cat's paw' to pull the employers' chestnuts out of the anti-trust fires."

All of the decisions relied upon by petitioner constitute nothing more than a restatement of the decision in Weber v. Anheuser-Busch, 348 U.S. 468 (1954).

which made clear that states could not interfere in the field of Federal Labor legislation under the guise of doing so through anti-trust laws. However, as pointed out by the decision in the first LEWIS appeal, that was not the problem involved in this case. The problem here comes squarely within the rule of Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949).

Many cases on the issue of labor union immunity from anti-trust acts have been decided contrary to petitioner's position both before and after the Oliver case:

Union reliance on the case of Teamsters v. Oliver, supra, was rejected where a Union combined with employers to restrict marketing hours by contract, Jewell Tea Co. v. Meat Cutters, 274 F.2d 217 (7th Cir. 1960). A Federal Court has entertained a suit charging unions and employers with conspiracy to violate State Anti-Trust Laws, Red Owl Stores v. Amalgamated Meat Cutters, 109 F. Supp. 629 (D. Minn. 1953). See also, Alpha Beta Food Markets, Inc. v. Amalgamated Meat Cutters, 147 Cal. App. 2d 343, 305 P.2d 163 (1956); Kold Kist v. Amalgamated Meat Cutters, 99 Cal. App. 2d 191, 221 P.2d 724, (1950).

Other states have applied their anti-trust acts to labor management combinations in the face of pre-emption claims by Unions; Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); Building Contractors Assn. v. Gugliemelli, 22 CCH Lab. Cas., Par. 67065 (N.Y. Supreme Court, N.Y. County Special Term, Part III, 1952). (Conspiracy by Union and employers to violate federal and state anti-trust laws by refusal of Union to enter into contract with plaintiff on terms as favorable as extended to defendant employers).

Since the decision of Teamsters v. Oliver, supra, the following cases are noteworthy, although ignored by petitioner:

A union was denied immunity under its right of collective bargaining and also under the Norris-La Guardia and Sherman Acts where it conspired to make labor available to one group of employers under preferential conditions in order to restrain competition of another group of employers, Cuyahoga Plastering Contractors Assn. v. Lennox Halderman Co., 39 CCH Lab. Cas., Par. 66265 (N.D. Ohio 1960).

A complaint, charging a Union with conspiring with employers to raise wages to a point complainant couldn't afford, alleged a violation of federal anti-trust laws and the union was not immune Lewis v. Pennington 38 CCH Lab. Cas., Par. 65747 (E.D. Tenn. 1959).

Other recent cases on the subject have denied Union claims of immunity from anti-trust laws by reason of their labor position, Los Angeles Meat Drivers Local 626 v. U.S., 368 U.S. 965 (1962), Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958), Association of Orchestra Leaders v. Musicians, Local 77, 203 F. Supp. 755 (E.D. Pa. 1962).

The contention of the petitioner is even denied by the authorities of the United States charged with enforcement of anti-trust laws: Lee Loevinger, head of the Anti-Trust Department of the United States Department of Justice, stated before Congress as follows:

> "Where Labor combines with business to impose what are in effect, business

> restraints under the rule of the Allen-Bradley case, it enjoys no immunity and I see no reason why it should have immunity." Hearing before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 18 (1961).

Petitioner seeks an order of this Court that will deny the State jurisdiction over violations of its laws which existed under common law even prior to the enactment of the statutes in question.

Consideration should be given to the statement of the Court in Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950) where the Court said in answer to a Union challenge to its anti-trust laws:

> "A state court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the state, lest it discovers later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty."

This Court itself has cautioned state courts on the subject:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved

> powers of a state, even where that may be done, unless,and except, so far as, its purpose to do so is clearly manifested."

Illinois Central R.R. v. State P.U.C. of Ill., 245 U.S. 493, 510 (1918).

Petitioner's claim that the state court is deciding labor organization status is spurious. There is no finding or judgment of the state court to this effect. No damages have been awarded. There is nothing to indicate any one will be held liable for damages who is not legally responsible. There is no showing the issue was ever raised below as a Federal question.

## IV.

## CONCLUSIONS

It is submitted that this Honorable Court should not destroy traditional state jurisdiction on the basis of a claim of petitioner that while it has been caught "red handed" and twice condemned for violating the anti-trust laws of California, it should be excused for destroying the business of LEWIS because one of the conspirators is a labor union.

All of the other issues and references made in the petition on file herein and in the points and authorities and documents filed in support thereof, involve no issue for purposes of the issuance of the writ sought and would properly be directed to the Trial Court. Certainly no presumption is to be indulged in, at this state, that the trial court would not obey the law heretofore

laid down by the legislative and judicial bodies, whose decisions must control its determination based on the evidence before the Trial Court.

Lewis prays that this Honorable Court summarily deny the petition for hearing filed herein, said petition being totally lacking in merit.

Respectfully submitted,

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OSCAR F. IRWIN
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